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(2)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR

Cr.A.No. 2465 of 1999

(12164)

Filed on 16/9/99 by Shri ... Advocate

CRIMINAL APPEAL UNDER SECTION 374 (2)
OF THE CODE OF CRIMINAL PROCEDURE,1973

Rlo. A.R

Mr. Kochar

Appellants: Accused (In Jail)

1. Randhir, aged 20 years, son of Jagannath, resident of Allahabad, U.P.
2. Devdas, aged 40 years, son of Dalesh, resident of Lateran, P.S.Basoda, District Sehore, M.P.
3. Roop Singh, aged 27 years, son of Ganpat, resident of Multai, District Betul, M.P.
4. Rajesh, aged 55 years, son of Vanshi, resident of Lasan Gaon, P.S.Lasan, District Nasik (Maharasthra).

Mr. Chaturvedi

Mr. Kochar

Received copy of Petition with Annexure(s)
1619
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O/o Advocate General
M.P. JABALPUR

versus

Respondent: The State of Madhya Pradesh

...

CONVICTION:	SENTENCE:
u/s 324/34 I.P.C.	R.I. for 3 years to each
u/s 396 I.P.C.	Imprisonment for life & fine Rs.5000 to each, in default, Additional RI for one year to each.

Both substantive sentences to run concurrently.

A. F. R.

(130)

14/11/08

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.2465 of 1999

Randhir and others

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

JUDGMENT FOR CONSIDERATION

Sd/-
L.C. BHADOO
Judge

HON'BLE MR. JUSTICE DHIRENDRA MISHRA

Sd/-
DHIRENDRA MISHRA
Judge

POST FOR JUDGMENT ON 18TH JANUARY, 2006

Sd/-
L.C. BHADOO
Judge

(131) A.F.R.

HIGH COURT OF CHHATTISGARH, BILASPUR

DIVISION BENCH*: -

HON'BLE SHRI L.C. BHADOO AND

HON'BLE SHRI DHIRENDRA MISHRA, JJ.

Criminal Appeal No.2465 of 1999

Randhir and others

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

Present: -

Shri Arun Kochar, Advocate:	For appellants No.1 and 4 namely Randhir & Rajesh.
Shri N.K. Chatterjee, Advocate:	For appellants No.2 and 3 namely Devdas & Roop Singh.
Shri U.N.S. Deo, Addl. Public Prosecutor:	For the State/respondent

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JUDGMENT

(Delivered on 18th January, 2006)

The following judgment of the Court was delivered by ***L.C. Bhadoo J.***:-

1. By this appeal under Section 374 (2) of the Cr.P.C. accused/appellants namely Randhir, Devdas, Roop Singh and Rajesh have questioned the legality of the judgment of conviction and order of sentence dated 28-8-99 passed by the learned 2nd Additional Sessions Judge, Raipur in Sessions Trial No.416/94 whereby learned Additional Sessions Judge after holding each of the accused/appellants guilty for commission of offence under Sections 396 and 324 read with Section 34 of the I.P.C., sentenced them to undergo imprisonment for life and to pay a fine of Rs.5,000/- each, in default of payment of fine to further undergo R.I. for one year each, and to undergo R.I. for 3 years respectively. It was further directed that both the sentences shall run concurrently. The accused/appellants are in detention since 1-7-94 thereby they are in detention round about more than 11 years 6 months.

2. The case of the prosecution, as per the Dehati Nalishi (Ex.-P/19) lodged by Kishorilal P.W.-22 in the police station Abhanpur, in brief, necessary for the

disposal of this appeal is that in the intervening night of 13th/14th June 1994 Kishorilal (PW-22) and his family members after taking dinner at about 10 p.m. went for sleep. He was sleeping in the central room, the doors of which were open. His wife Swarnarani (since deceased) and his younger son Raviraja aged about 9 years were sleeping on a cot near the front door. In front hall room his elder son Mahendra Singh @ Vikki (since deceased) was sleeping on a cot. In last room his daughters namely Rani, second daughter Rakhi @ Switi (since deceased) and third daughter Shweta were sleeping. At about 1 a.m. when the light went off on account of failure of electricity supply, somebody assaulted on his head with an iron rod, as a result of which he fell down on the ground and became unconscious. When he regained consciousness at about 2.15 a.m., he saw that 3 persons were standing in his room, each of them having torch, they were taking out ornaments and other goods from the Almirah. They were talking in their language which he was not able to understand. They were searching articles after lighting the torch. They were wearing lower under garments (Chaddi) and upper under garments (Baniyan). Two persons were of 5 ft. height and third person was 4½ ft. in height. At about 2.50 a.m. the electric light was restored, therefore, one person covered his face with a Chaddar which was lying on the cot and 3 persons had taken the articles, went in the corridor after closing the door. He after bolting the door from inside started raising cries "save save". Other 2-3 persons were standing outside. After opening the door, he went to the room where Vikki was sleeping, went outside and started raising cries on which his younger son Raviraja came near him. There was injury on the head of Vikki, blood was oozing out of it. He was unconscious. Thereafter, he went to the mother of Vikki. There was injury on her head, blood was oozing out of it. She was dead. He also went to the room of his daughters and saw that there was injury on the head of Rani, she was unconscious. There was injury on the head of Switi, blood was oozing out of it. She was dead. There was injury on the head of Shweta, blood was oozing out of it, she was unconscious. Hearing the cries, Tulsi Panwala, neighbours Ratan Lal, and hotelier came on the scene. They were apprised by him about the incident. They brought Drs. Kukreja and Tiwari. Both the doctors after checking all the persons advised them to go to D.K. Hospital, Raipur for treatment. One iron spring plate stained with blood was lying on the dining table which was used as a weapon of offence for the purpose of assaulting.

3. The accused persons took away the currency notes of Rs.70,000/-, golden ornaments weighing 20 Tolas and silver ornaments weighing 10 Tolas. Based on this Dehati Nalishi the Officer in-charge Police Station Mr. Jagdish Prasad registered F.I.R. (Ex.-P/20). Injured Kishorilal and Raviraja were sent for medical examination to the Government Hospital, Raipur where after examination, injury report Ex.-P/4 of Raviraja was prepared and injury report Ex.-P/29 of Kishorilal was prepared. After examination, injury reports Ex.-P/30 and P/31 of Shweta and Rani were prepared respectively. Switi, Swarnalata and Mahendra Singh succumbed to the injuries. The Investigating Officer after giving notice to the Panchas prepared Panchanamas Ex.-P/12, Ex.-P/14 and Ex.-P/16 of the dead bodies of Mahendra, Swarnalata and Switi respectively. The dead bodies were sent for postmortem examination where Dr. Arvind Nevalwar (PW-8) conducted postmortem on the dead bodies of Switi, Swarnalata and Mahendra, and prepared Postmortem reports Ex.-P/8, Ex-P/9 and Ex.-P/10 respectively. Patwari T.R. Phunte (PW-7) prepared the site plan Ex.-P/7. Investigating Officer S.R. Yuvane (PW-25) took into possession iron spring plate, lock, country made pistol, liquor bottle, iron rod, blood stained clothes and blood stains from the place of occurrence under Ex.-P/19-A. Sub Inspector Kadir Khan (PW-17) on the information of head constable Ram Nath prepared merg intimation (Ex.-P/23) of Switi, Ex.-P/24 of Swarnalata and Ex.-P/25 of Mahendra Gulati. The clothes of the deceased persons were taken into possession by Raghunath Prasad (PW-18) under Ex.-P/25-A. The blood stained articles were sent under Ex.-P/26 for examination to the Forensic Science Laboratory, Raipur.

4. Accused Prahlad was arrested on 29-6-94 and his identification parade was conducted by Naib Tehsildar PW-15 Anil Kumar, in that he was correctly identified by PW-20 Raviraja. The identification parade of accused Rajesh, Devdas, Roop Singh and Randhir was conducted on 1-7-94 by Tehsildar S.N. Motwani (PW-23) and they were correctly identified by PW-22 Kishorilal. He prepared the identification memos Ex.-P/2, Ex.-P/3, Ex.-P/17 and Ex.-P/18 respectively. After completion of the investigation, charge sheet was filed for commission of offence under Sections 396 and 307 of the I.P.C. against accused Prahlad along with the accused/appellants in the Court of Judicial Magistrate, 1st Class, Raipur. However, accused Balasingh and Jitendra could not be arrested and accused Prahlad absconded during trial. The Judicial Magistrate committed the case to the Sessions Court,

Raipur from where learned 2nd Additional Sessions Judge received the case on transfer for trial.

5. The prosecution in order to establish the charge against the accused persons examined 25 witnesses. On the other hand, the statements of the accused persons were recorded under Section 313 of the Cr.P.C. in which the accused persons denied the prosecution evidence and stated that they are innocent, they have been implicated in a false case and they were shown to the witnesses in the police station.

6. Learned Additional Sessions Judge after hearing argument of the Additional Public Prosecutor and counsel for the accused persons, convicted and sentenced each of the accused/appellants as mentioned in para-1 of this judgment.

7. We have heard learned counsel for the parties.

8. Learned counsel for the accused/appellants have not disputed the homicidal nature of death of Mahendra, Switi and Smt. Swarnalata as also the factum of commission of dacoity in the house of PW-22 Kishorilal in the intervening night of 13th/14th June 1994. They have also not disputed the factum of receiving injuries by Kishorilal, Rani, Shweta and Raviraja in the same incident. They simply argued that the accused/appellants have been falsely implicated in the crime in question.

9. They further argued that features and clear identification of the accused were not given in the First Information Report. It was not possible for Kishorilal to identify the accused persons in the torch light. The torches in question which were placed on cooler and which the accused persons were carrying have not been recovered. Therefore, the prosecution has not been able to establish involvement of the accused/appellants in the crime in question, as the whole case rests on the identification of the accused persons by PW-22 Kishorilal as no recovery of the looted ornaments and currency notes or any other item have been effected from the accused persons in order to connect them with crime in question.

10. In order to connect the accused/appellants with the crime in question i.e. commission of murders of Mahendra, Switi and Swarnalata while committing dacoity, the whole case rests on the identification of the accused persons by PW-22 Kishorilal. As has been mentioned above that no recovery of the looted articles have been effected from the accused persons, the settled law regarding identification of the accused persons in the dark night where the accused persons were not known to the victims of

the crime is that the identifying features of the culprits must be mentioned in the first information report and in the statement given before the police. The Hon'ble Apex Court in the matter of **Manzoor Versus State of Uttar Pradesh** reported in **Cr.L.R. (S.C.) 1982, page 134** held as under:

> 'The torches have not been produced in evidence, and the investigating officer P.W.12 would say in his evidence that he saw those torches and returned them to the home-guards. It is not known why the investigating officer P.W.12 thought it fit to return the torches with the aid of which the home-guards are stated to have seen the two persons running away from the scene of occurrence though that will be a relevant piece of material evidence in the case. If at the earliest opportunity the home-guards did not mention any identifying features of the culprits when they were examined by P.W.12, it is difficult for us to believe how P.W.2, could have identified both the appellants nearly two months later.'

The said case was based on the identification of the accused persons by four home-guards because they had stated to have flashed their torch lights and saw the two persons running away from the scene of occurrence after they had heard the alarm of the injured Gul Bahar near the railway line. In the matter of **Bollavaram Pedda Narsi Reddy and others Versus State of Andhra Pradesh** reported in **1991 Supreme Court Cases (Cri) 586** the Hon'ble Apex Court held that:-

> "The credibility of the evidence relating to the identification depends largely on the opportunity the witness had to observe the assailants when the crime was committed and memorize the impression. When the crime was committed during the hours of darkness and the assailants were utter strangers to the witnesses, the identification of the accused persons assumes great importance. The prevailing light is a matter of crucial significance. The necessity to have the suspects identified by the witnesses soon after their arrest also arises. In absence of cogent evidence that the witnesses by reason of the visibility of the light at the place of occurrence and proximity to the assailants had a clear vision of the action of each one of the accused persons in order that their features could get impressed in their minds to enable them to recollect the same and identify the assailants even after a long lapse of time, it would be hazardous to draw the inference that the accused-appellants are the real assailants.'

11. Applying the above principle, we shall now scrutinize the evidence available on record in the light of argument advanced by learned counsel for the accused/appellants and to see whether the prosecution has been able to establish involvement of the accused persons in the crime in question based on the identification of the accused persons by PW-22 Kishorilal. PW-22 Kishorilal has stated that when in the mid night he regained

consciousness, he found himself lying on the ground, as when he was sleeping, somebody pushed him on the ground. On regaining consciousness, he saw that three accused persons namely Rajesh, Devdas and Roop Singh were standing in his room, the light of the room was off, but the accused persons were having torch in their hands. Two torches were kept on the cooler out of which light of one torch was flashing towards the cot and light of second torch was flashing towards the Almirah and window. Light of two torches which were kept on the cooler were regularly flashing. I saw the accused persons from the light of torches which were kept on the cooler and which were with the accused persons. One accused was taking out the goods from Almirah and throwing them on the cot. Second accused was searching the goods which were thrown on the cot and third accused was taking away the goods. It appears that two or three persons were standing outside. This witness after touching the accused Randhir in Court stated that fourth accused was Randhir who was coming in the room and going out of the room. The accused persons stayed in the room till 5 minutes after the electric light was restored and thereafter they left after covering his face with the clothe. He lodged the report Ex.-P/19. In para-8 he has stated that he identified accused Rajesh, Devdas, Roop Singh and Randhir in the identification parade.

12. If we compare the evidence of this witness with the report (Dehati Nalishi) Ex.-P/19 lodged by him and his police case diary statement Ex.-D/2, he has made lot of improvement in material particulars in his evidence before the Court. In the first instance, in the report Ex.-P/19 and his police case diary statement Ex.-D/2 he has stated that 3 accused persons entered his room. There is no mention about 4th person either in the report (Dehati Nalishi) Ex.-P/19 or in the police case diary statement Ex.-D/2. In the last line of the report Ex.-P/19 (Dehati Nalishi) he had stated that he will be able to identify 3 thieves from their appearance and talks. His son Raja will also be able to identify. In the said report (Ex.-P/19) regarding identification of the accused persons he has mentioned that 2 persons were of 5 ft. height and one was of 4½ ft. height. No other features such as the stature, complexion, colour of skin were given by this witness in the said report or in the police case diary statement. In the evidence before the Court this witness added 4th accused person Randhir also whereas there is no mention about 4th accused person i.e. Randhir in the said report Ex.-P/19 or police case diary statement Ex.-D/2.

13. It is admitted position that the accused persons were unknown to this witness and there was total darkness in the room. This witness, as mentioned above, has said to have identified the accused persons in the torches' light which were kept on the cooler and which were with the accused persons. Except the height of 3 persons nothing else was mentioned by this witness in the report (Dehati Nalishi) Ex.-P/19 or in the police case dairy statement Ex.-D/2 about identifying features such as complexion, facial impression, colour of skin and body of the accused persons. When the accused persons were busy in taking out the articles from Almirah, then in the ordinary course it would not have been possible for this witness to observe the identity and having impression about the identity of the accused persons. When the light of the torch, which was kept on the cooler was towards the cot, then it would not have been possible for this witness to keep his eyes open because dacoits were standing in the room in the close proximity. There is no evidence to the effect that whether the accused persons had taken away the torches which were kept on the cooler or they were left on the cooler. To this effect the evidence of PW-22 Kishorilal and of the investigating officer PW-25 is silent. Had those torches were left on the cooler, then why those torches were not taken into custody by the police. Nothing short of explanation has been given to this aspect of the case. On perusal of the identification memos, by Ex.-P/2 Kishorilal identified accused Rajesh, by Ex.-P/3 he identified accused Devdas, by Ex.-P/17 he identified accused Roop Singh and by Ex.-P/18 he identified accused Randhir. In these identification memos it has not been mentioned by the officer PW-23 S.N. Motwani that whether this witness while identifying the accused persons had said anything about the part played by each of the accused persons in committing dacoity. Nothing has been mentioned in these identification memos that while committing dacoity which accused was standing at which place, who was taking out the goods from Almirah, who was searching articles from the cot and who was taking away articles outside the room. Even in the Court evidence this witness has stated that out of the 2 torches kept on the cooler, the light of one torch was flashing on his cot and second was on the Almirah, but the same has not been mentioned in the report (Dehati Nalishi) Ex.-P/19 and the police case diary statement Ex.-D/2. Therefore, this is the improvement made in the Court evidence.

14. Similarly, in the report (Dehati Nalishi) Ex.-P/19 and the police case diary statement Ex.-D/2 he has stated that when at about 2.50 a.m. the light was

restored, one accused put the Chaddar on his face. While identifying the accused persons through identification memos Ex.-P/2, P/3, P/17 and P/18, this witness has not stated before Tehsildar that which accused put Chaddar on his face. In the report (Dehati Nalishi) Ex.-P/19 and the police case diary statement Ex.-D/2 he has stated that when the light was restored one accused put the Chaddar on his face, but he has made improvement in the evidence before the Court that after 5 minutes of restoration of the light, the Chaddar was put on his face. Perhaps this improvement has been made in order to show that he was able to see the accused persons in the light. Similarly, in the Court evidence he has stated that he was able to identify 4th accused person but as has been mentioned earlier that there is no mention in the report (Dehati Nalishi) Ex.-P/19 and the police case diary statement Ex.-D/2 about the 4th accused person entering in his room. While making police case diary statement this witness had stated that one accused was taking out the goods from Almirah, second was taking the things from the cot and third was taking away the goods, but the same was not mentioned in the report (Dehati Nalishi) Ex.-P/19 and the police case diary statement Ex.-D/2.

15. Further this witness has stated that he has not disclosed to the police while making the report (Dehati Nalishi) Ex.-P/19 and the police case diary statement Ex.-D/2 about the colour of face, colour of eye and the shape of face. In para-38 of the evidence he has clearly stated that he has not informed the I.O. the basis of the identification of each accused. The evidence of PW-20 Raviraja, son of Kishorilal, is regarding the identification of only accused Prahlad who is absconding. Even in the evidence of Raviraja there is a lot of improvement and the facts which were not stated by him in the police case diary statement Ex-D/1, he gave evidence before the Court. Therefore, in view of the above shortcoming in prosecution case, the defence taken by accused persons that before the identification parade they were shown to the witnesses by the police appears to be plausible and possibility of the same cannot be ruled out.

16. In view of the above discussion, the shaky evidence of PW-22 Kishorilal to the effect that he was able to identify the accused persons during the dark night in the torch light does not inspire confidence of the Court. There is no other material brought on record by the prosecution to corroborate the evidence of this witness on any point regarding involvement of the accused persons in dacoity in question. Therefore, applying the principle of identification laid down by the Hon'ble Apex Court in the matter of

Bollavaram Pedda Narsi Reddy and others (Supra) it is difficult to place reliance and confidence on the evidence of PW-22 Kishorilal in order to connect accused/appellants namely, Randhir, Devdas, Roop Singh and Rajesh in crime in question. Therefore, finding of the trial Court convicting the accused namely Randhir, Devdas, Roop Singh and Rajesh for the commission of offence under Sections 396 and 324 read with Section 34 of the I.P.C. cannot be sustained, as the prosecution has not been able to prove the offence against the accused persons beyond reasonable doubt.

17. In the result, the appeal of accused/appellants namely Randhir, Devdas, Roop Singh and Rajesh succeeds. Their conviction and sentence under Sections 396 and 324 read with Section 34 of the I.P.C. are set aside. They be set at liberty forthwith unless required to be detained in any other case.

Sd/-
L.C. BHADOO
Judge

Sd/-
Dhirendra Mishra
Judge

Barve